

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

FRESH EXPRESS FOOD STORE and
VICTOR BROWN & AKWASI OPOKU
Respondents

Case No.: I-00-70233

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985, as amended (D.C. Official Code §§ 2-1801.01 *et seq.*), and Title 23, Chapter 30 of the District of Columbia Municipal Regulations (“DCMR”). By Notice of Infraction served June 21, 2001, the Government charged Respondents Fresh Express Food Store (“Fresh Express”), Victor Brown and Akwasi Opoku with a violation of 23 DCMR 3012.1 for allegedly failing to take all necessary precautions to keep the premises free from rats and vermin.¹ The Notice of Infraction alleged that the violation took place on May 15, 2001 at 906 H Street, N.E., and sought a fine of \$1,000.

On July 12, 2001, Respondents filed an answer of Deny pursuant to D.C. Official Code § 2-1802.02(a)(3), and a hearing was held on August 22, 2001. Alice Jackson, the charging official in the case, appeared on behalf of the Government. Akwasi Opoku appeared on behalf of

¹ 23 DCMR 3012.1 provides:

All persons engaged in the operation of any restaurant, delicatessen, or catering business shall be required to take all necessary precautions to keep the premises free from rats and vermin.

himself and Respondent Fresh Express.² Respondent Victor Brown did not appear and, pursuant to D.C. Official Code § 2-1802.03(b), the hearing proceeded in his absence.

At the start of the hearing, Mr. Opoku and Fresh Express sought leave to amend their answer from Deny to Admit with Explanation pursuant to D.C. Official Code § 2-1802.02(a)(2). Without objection from the Government, I granted that motion. Mr. Opoku and Fresh Express also requested a reduction or suspension of any fines.

Mr. Opoku explained that he purchased Fresh Express from Mr. Brown on December 1, 2000, and at that time, Mr. Opoku noticed that the premises had a rodent problem. He immediately hired an exterminator, Nu Tech Pest Elimination, to help eliminate the problem. Mr. Opoku stated that a few months later when he re-configured the store, he believes that he may have dislodged some old rodent feces. As such, according to Mr. Opoku, the signs of rodent activity observed by Inspector Jackson on the date of the alleged violation were old. Fresh Express's license to operate was summarily suspended on May 14, 2001, based upon Inspector Jackson's observations.

² At the hearing, Mr. Opoku stated that he appeared on behalf of Fresh Express. Mr. Opoku represented that he was the owner of Fresh Express at the time of the alleged violation, but that as of July, 2001, he had sold his interest to another party. Because the Notice of Infraction and orders of this administrative court were served upon Respondents at Fresh Express's 906 H Street, N.E. location, I find that Fresh Express's current owner also received notice of these proceedings, but, in keeping with Mr. Opoku's representations, elected not to appear. Based on this, as well as Mr. Opoku's relationship to Fresh Express at the time of the alleged violation, I conclude that Mr. Opoku, without objection from Fresh Express's current owner, has held himself as having the actual or apparent authority to bind Fresh Express for purposes of these proceedings. *See, e.g., DOH v. Bloch & Guggenheimer, Inc.*, OAH No. I-00-10439 at 1 n.1 (Final Order, April 18, 2001) (finding person who, without objection, acted as apparent agent for respondent and had some privity of interest could bind respondent for purposes of disposition); *see also DOH v. Valira Limited Partnership*, OAH No. I-00-20388 at 2 n.1 (Final Order, June 6, 2002); *DOH v. JV Trucking, Inc.*, OAH No. I-00-10445 at 2 n.2 (Final Order, March 2, 2001); *DOH v. MDS Construction Corp.*, OAH No. I-00-11001 at 5 n.2 (Final Order, August 17, 2001); *Insurance Management, Inc. v. Eno & Howard Plumbing Corp.*, 348 A.2d 310, 312 (D.C. 1975).

In light of the improvement she observed on the premises since Mr. Opoku became the owner, and the additional improvements following the summary suspension, the Government recommended a suspension of the fine.

Based upon the entire record in this matter, I now make the following findings of fact and conclusions of law:

II. Findings of Fact

1. Mr. Akwasi Opoku took ownership of Fresh Express from Victor Brown on December 1, 2000. Mr. Opoku owned Fresh Express until July 7, 2001.

2. By their answer of Admit with Explanation, Mr. Opoku and Fresh Express have admitted violating 23 DCMR 3012.1 on May 15, 2001 at 906 H Street, N.E.

3. On May 15, 2001, Mr. Opoku and Fresh Express failed to “take all necessary precautions to keep the premises free from rats and vermin” at 906 H Street, N.E. 23 DCMR 3012.1.

4. Upon taking ownership of Fresh Express in December, 2000, Mr. Opoku observed rodent activity on the premises. He immediately hired an exterminator, Nu Tech Pest Elimination (“Nu Tech”), to treat the infestation. Mr. Opoku ended his pest control services contract with Nu Tech in or about April, 2001 after concluding that there were no further signs of rodent activity on the premises.

5. In May, 2001, Mr. Opoku re-configured Fresh Express. During this re-configuration, additional rodent feces were discovered by Mr. Opoku, and later observed by Inspector Jackson.³ Fresh Express's license to operate was summarily suspended on May 14, 2001.

6. Upon receiving the summary suspension, Mr. Opoku hired Robin Services Pest Control for bi-monthly extermination services.

7. Mr. Opoku believed that there are on-going rodent control problems in the building housing Fresh Express not related to Fresh Express's operations, but that the landlord has not taken any action to address those problems.

8. Mr. Opoku and Fresh Express have accepted responsibility for their unlawful conduct.

9. Based on the improvement she observed on the premises since Mr. Opoku became the owner of Fresh Express, and the additional improvements following the summary suspension, the Government recommended a suspension of the fine.

III. Conclusions of Law

1. Mr. Opoku and Fresh Express violated 23 DCMR 3012.1 on May 15, 2001. Because Mr. Brown did not own Fresh Express at the time of the charged violation, and the Government has not offered any additional evidence into the record of any other relationship with Fresh Express, the charge against Mr. Brown shall be dismissed.

³ Respondents Opoku's and Fresh Express's answer of Admit with Explanation obviates the need for me to determine whether, as Mr. Opoku suggests, the signs of rodent activity observed by Inspector Jackson were old.

2. The Rodent Control Act of 2000 authorizes a fine of \$1,000 for a first violation of § 3012.1.⁴ 16 DCMR §§ 3201.1(a)(1) and 3216.1(i). While the Government has recommended a suspension of the fine, the circumstances herein do not warrant such relief. *DOH v. M&T Mortgage Corp.*, OAH No. I-00-20272 at 3 n.4 (Final Order, August 7, 2002) (outlining guidelines for crediting recommendations from the Government as to the propriety of a reduction or suspension of a fine or statutory penalty). Mr. Opoku recognized upon assuming ownership of Fresh Express that there was a substantial rodent problem on the premises. While he made substantial efforts to address that problem, he discontinued those efforts when it appeared, at least on the surface, that the rodent activity had been eliminated.

3. Compliance with the requirements of § 3012.1, however, requires a more sustained effort to take “all necessary precautions” to eliminate rodent and vermin activity. Mr. Opoku’s discontinuance of pest control services in April, 2001, despite his acknowledged awareness of on-going rodent problems in the building housing Fresh Express, fails to meet that standard. *See DOH v. M&M Food Vending, Inc.*, OAH No. I-00-70243 at 3-4 (Final Order, August 21, 2001) (concluding that, in light of respondent’s assertion of a wide-spread rodent problem in the area, compliance with § 3012.1 required “a more substantial preventative system” than it had employed). In light of Mr. Opoku’s and Fresh Express’s acceptance of responsibility, demonstrated and substantial efforts to attempt to comply with the requirements of § 3012.1, and the Government’s recommendation, however, I will reduce the fine to \$500. D.C. Official Code §§ 2-1802.02(a)(2) and 2-1801.02(b)(6); U.S.S.G. § 3E1.1; 18 U.S.C. § 3553.

⁴ The Rodent Control Act of 2000 is Title IX of the Fiscal Year 2001 Budget Support Act of 2000, effective October 19, 2000, D.C. Law 13-172. *See* 47 D.C. Reg. 8962 (November 10, 2000); 47 D.C. Reg. 6308 (August 11, 2000). Section 910(b) of that Act established new fines for violations of various rodent control measures, including § 3012.1. 47 D.C. Reg. at 6339 (August 11, 2000).

IV. Order

Based upon the foregoing findings of fact and conclusions of law, and the entire record of this case, it is, hereby, this _____ day of _____, 2003:

ORDERED, that Respondent Victor Brown is **NOT LIABLE** for violating 23 DCMR § 3012.1 as charged in the Notice of Infraction; and it is further

ORDERED, that Respondents Akwasi Opoku and Fresh Express Food Store are **LIABLE** for violating 23 DCMR § 3012.1 as charged in the Notice of Infraction (No. 00-70233); and it is further

ORDERED, that Respondents Akwasi Opoku and Fresh Express Food Store, who are jointly and severally liable, shall pay a fine in the total amount of **FIVE HUNDRED DOLLARS (\$500)** in accordance with the attached instructions within 20 calendar days of the date of mailing of this Order (15 calendar days plus 5 days for service by mail pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that, if Respondents fail to pay the above amount in full within 20 calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1½% per month or portion thereof, beginning with the date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real or personal property owned by Respondents pursuant

to D.C. Official Code § 2-1802.03(i) and the sealing of Respondents' business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

/f/ 01/08/03

Mark D. Poindexter
Administrative Judge